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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 729

LINA H. HALVERSON, BENEFICIARY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH J. WITRY,
Attorney for Petitioner.

FRANK A. MCCARTHY,
JOHN E. TOOMEY,
JAMES C. O'BRIEN, JR.,
Of Counsel.

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IN THE

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No.

LINA H. HALVERSON, BENEFICIARY,
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vs.

THE UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lina H. Halverson respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit rendered in the above case on the 25th day of June, 1941 (R. 101) reported in 121, F. (2d) 420.

I.

Summary Statement of the Matters Involved.

The petitioner, Lina H. Halverson, as beneficiary under a war risk insurance policy, instituted suit against the United States to recover the $10,000.00 death benefit contained in the policy. The evidence was heard without a

jury and the trial Court entered judgment against petitioner for costs (Rec. 81). On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgment of the Trial Court was affirmed. (R. 101). Petition for rehearing was denied August 4th, 1941. (R. 102).

II.

The Facts.

Harry M. Halverson, deceased insured, secured an honorable discharge from the military service of the United States in the year 1919. While in the service he was issued a Ten Thousand Dollar war risk insurance policy which lapsed for non-payment of premium on July 1, 1919. (Rec. 20.) On March 11, 1931, he signed an application to reinstate this policy. (Rec. 47.) He submitted to a medical examination at Hines, Illinois, and was pronounced a first class risk by Dr. A. L. Little, General Medical Examiner of the Veterans Administration. (Rec. 52.) In the application for insurance he was asked if he had ever been treated for any disease of the kidney or bladder and if he contracted any disease or consulted a physician in regard to his health since the date of his discharge. He answered "no." (Rec. 50.) The policy was issued on March 31, 1931. It contained a provision that it would be incontestable from the date it was issued except for fraud or non-payment of premiums. (Rec. 19.) Insured died on May 28, 1937. (Rec. 62.) All premiums were paid on the policy up to and including one month subsequent to insured's death. (Rec. 20.) The June 1937 premium not then due amounting to $22.90 was paid in advance by petitioner in May 1937. She later requested the return of this unearned premium, but it was not repaid. (Rec. 68, 75.) The total premiums paid by insured during the life of the policy, that is from March 31,

1931, to June 1937, were $796.40, no part of which has been repaid or tendered. (Rec. 75.) At the time insured applied for insurance he carried two other insurance policies with private companies on his life, one for $2,000.00 and the other for $2,500.00. After the issuance of this policy he dropped the other two policies. (Rec. 68.) After insured died petitioner, who was the beneficiary named in the policy, filed her claim for the death benefit. It was denied by the Director of Insurance on July 6, 1937, on the ground that insured made fraudulent statements in his application for insurance. (Rec. 74.) Her appeal from this decision was denied on September 15, 1937, and the claim was finally rejected by the Administrator of Veterans Affairs on February 4, 1938. (Rec. 20.) This suit was commenced on February 28, 1938. (Rec. 2.)

The evidence shows that on December 10, 1932, twenty months after the issuance of the policy herein sued upon, insured was examined by Dr. McDougal at Hines Hospital, a regional office of the Administrator of Veterans. (Rec. 29, 30.) This physician made an urology examination of insured and diagnosed his condition as pre-malignant cancer of the bladder. Insured gave a history to Dr. McDougal in 1932, that he first noticed blood in his urine three years prior to that time; he said that in 1930 a physician made a cystoscopic examination of the bladder and found a polypus growth, sometimes called a wart. (Rec. 30.) This history together with Dr. McDougal's diagnosis of insured's condition was then dictated into a dictaphone after which a stenographer transcribed seven copies, copies of which Dr. McDougal supposed were sent to various departments of the government, including Washington, and the Department of Justice. (Rec. 32.)

Dr. Martin R. Broman who made the cystoscopic examination of insured testified that he made the examination on September 20, 1930, and it was his recollection

that insured stated at that time that he first noticed blood in his urine a week before that date. He said a cystoscopic examination consists of inserting an instrument with lights into the bladder so that you can see if there are any abnormalities. He said he found a small growth on the posterior wall of the bladder, which is known as a wart-like growth. (Rec. 34.) That he told insured to return and he would cauterize it or burn it out. The physician said a papilloma is not considered serious but of course, should be investigated. He never saw insured after that time and he did not tell him that the growth was malignant or might become cancerous. He also said that in his opinion it was not cancerous at the time of that examination. (Rec. 36.)

There was also evidence that insured discussed his condition generally with a physician on two occasions. (Rec. 27.) Once in March, 1920, with a Dr. Bowe, who was then attending insured's wife at the birth of a baby. (Rec. 27.) Insured is supposed to have complained that he had some backaches since service in France and of pain and of frequent urination. (Rec. 27.) It was Dr. Bowe's recollection that he took his blood pressure and took a specimen of his urine and made a urinalysis in his office. (Rec. 27.) This was denied, however, by petitioner, and to rebut his testimony she testified that the conversation between insured and Dr. Bowe was very informal, that the doctor inquired how insured was feeling in a "kidding manner" and insured replied that he had a backache and the doctor told him to drink more water. (Rec. 65.) She denied that the doctor took his blood pressure or a sample of his urine. (Rec. 65.) Petitioner then offered in evidence an affidavit signed by Dr. Bowe (Plaintiff's Exhibit 2), which stated that the consultation and examination of insured on March 15, 1920, did not extend over a period of fifteen minutes and that insured's color was good, his general appearance as to health excellent

and that he did not tell him that he was in poor health and that he prescribed nothing more than diet and urolithia. (Rec. 29.) The second time that Dr. Bowe talked with insured regarding his health was on April 15, 1930, when he was treating insured's wife at her home for an acute cold. (Rec. 28.) The physician testified that insured complained of having passed blood in his urine occasionally since 1927, after exertion such as playing golf. (Rec. 28.) That he recommended that insured have a cystoscopic examination by some physician; that he did not have the type of an instrument for this purpose. He said that he did not consider this a consultation with insured. (Rec. 28.) On the other hand, petitioner showed that Dr. Bowe was treating her on April 15, 1930, for ptomaine poisoning and that before leaving the two men started to talk and she heard Dr. Bowe say: "How are you young fellow" and that her husband replied that he still had a backache and sometimes blood in his urine occasionally after playing golf. She heard Dr. Bowe say that this might come from anything but he suggested a cystoscopic examination. (Rec. 65.)

The undisputed evidence showed that outside of these so-called consultations with Dr. Bowe and the physical examination by Dr. Broman that insured never consulted a physician for any purpose whatsoever. He never complained of any illness and the first time his wife ever heard him mention blood in his urine was when he talked to Dr. Bowe in 1930; that thereafter he was examined by Dr. Broman and he seemed greatly relieved to find out it was just a wart and could be burned out at any time. (Rec. 66.) She said he seemed to have forgotten the incident entirely after that time.

The undisputed evidence shows that respondent was told of these so-called consultations with physicians on December 10, 1932, at the time insured gave his history

to Dr. McDougal. (R. 30.) The respondent was again apprised of the same matters on February 6, 1933, when insured filed a written application for compensation for disability in the world war. (Rec. 53.) In this application for disability he was asked to give the names and addresses of all civilian physicians who had treated him for any sickness, disease or injury since the beginning of service in the world war and he mentioned Dr. Bowe and Dr. Broman. (Rec. 53.) In this same application he was also asked if he ever applied for war risk insurance and he replied that he had. (Rec. 54.) Various letters thereafter were sent to him in connection with the application for disability and in some of these letters commencing as early as May 7, 1936, reference was had to evidence from Drs. Bowe and Broman. (Rec. 69, 70, 71, 72, 73). The record also shows that on each occasion that insured went to United States Veterans Hospital at Hines, Illinois, which occurred in 1933, 1935 and 1937, a history was taken from him in which he mentioned the first occasion when he passed blood in his urine and his cystoscopic examination. (Rec. 58, 60, 61, 62.) The result of these examinations, containing also the history of the patient and the various admissions, were typed, subscribed to by the Chairman and two members of the Board at Hines Hospital and by the Medical Officer and Associate Medical Officer.

Principal cause of insured's death was carcinoma of the bladder (Malignant) and the contributory cause of importance was Hydronephrosis, right Bronchopneumonia. (Rec. 21.)

III.

Statutes Involved.

Section 310 of the World War Veterans Act, 1924, as amended (U.S.C., Title 38, Section 512 (a), provides in part:

> Notwithstanding the provisions of sections 511 and 512 of this title, the United States, upon application to the Veterans' Administration, shall grant United States Government life (converted) insurance against death or permanent total disability in any multiple of $500. and not less than $1,000 or more than $10,000 to any person who had prior to May 29, 1928, applied or been eligible to apply for yearly renewable term insurance or United States Government life (converted) insurance: *Provided,* That such person is in good health and furnishes evidence satisfactory to the Administrator of Veterans' Affairs to this effect: *Provided further,* That no person may carry more than $10,000 of United States Government life insurance at one time: * * *

Section 307 of the same Act as amended (U.S.C., Title 38 Section 518) provides:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 447 of this title: * * *

Section 5 as amended (U.S.C. Title 38 Section 426) provides:

> "The Administrator of Veterans' Affairs, subject to the general direction of the President, shall admin-

ister, execute, and enforce the provisions of this chapter, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this chapter, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this chapter; and all decisions of questions of fact and law affecting any claimant to the benefits of Part II or III of this chapter shall be conclusive except as otherwise provided herein. All officers and employees of the Veterans' Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specially designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. * * *''

Section 7 as amended (U.S.C. Title 38, Section 430), also provides:

"The Administrator of Veterans' Affairs shall establish a central office in the District of Columbia, and such regional offices and suboffices, not exceeding one hundred in number, within the territory of the United States and its outlying possessions as may be deemed necessary by him and in the best interests of the work committed to the Veterans' Administration and to carry out the purposes of this chapter. Such regional offices and suboffices may, subject to final action by the Administrator in case of an appeal, and under such rules and regulations as may be prescribed by the Administrator, exercise such powers for hearing complaints and for examining, rating, and awarding compensation claims, granting medical, surgical, dental, and hospital care, convalescent care, and necessary and reasonable after care, granting vocational training

and all other matters delegated to them or some of them, by the Administrator as could be performed lawfully under this chapter by the central office. * * *"

IV.

Decisions of the District Court and United States Court of Appeals.

1. The District Court found that insured made false and fraudulent misrepresentations and concealments in his application to reinstate his policy of insurance and that the Government was not estopped from contesting the policy on the grounds of fraud even though it collected premiums for some time after it received notice of the facts upon which the defense of fraud was based (R. 80, 81).

The Circuit Court of Appeals affirmed the District Court (R. 96, 101) opinion reported in 121 F. (2d) 420, and held that insured made fraudulent answers in his application for insurance and that the Government was not estopped from contesting the policy on this ground even though it accepted premiums after it received notice of the facts constituting the fraud for the reason that the facts were not made known to the Insurance Division of the Administrator's office but to the Compensation and Disability Division, and that the Administrator was not bound by the knowledge acquired by other divisions within his own office (R. 96, 101).

V.

Questions Presented.

1. Is the Veterans' Administration bound by the knowledge acquired by its officers and employees within the scope of their authority in dealing with veterans on war risk insurance policies?

(a) Can the Administrator divide his office into Divisions such as Hospitalization, Disability and Insurance, and then deny that he had knowledge of certain facts in the Insurance Division although admitting that he had knowledge in his other two capacities?

2. In the issuance of war risk insurance contracts is the Government of the United States bound by the same rules in the conduct of its business as private insurance companies?

3. Does not the continued acceptance of premiums for a period of at least five years after the Administrator acquired notice that certain answers in insured's application for insurance were untrue estop the Government from contesting the policy on the ground of fraud?

4. Does a casual discussion of a person's health with a physician on two occasions ten years apart and an examination by another physician constitute consultation and treatment within the meaning of a policy of insurance?

VI.

Reasons Relied On for Allowance of Writ.

Petitioner believes that the writ of certiorari should be granted because:

(a) The Circuit Court of Appeals has decided an important question of Federal law dealing with war risk in-

surance contracts issued by the Government of the United States under authority of an Act of Congress. (Section 310 of the World War Veterans' Act, 1924, as amended, U.S.C. Title 38, Section 512 (a).) The question of whether the Government is bound by the same rules in the conduct of this business as private insurance companies has not been passed on by this Court. Your Honors have heretofore recognized the importance of the question and granted certiorari in two cases, (*Wilbur National Bank* v. *United States,* 294 U. S. 120, 79 L. Ed. 798, 55 S. Ct. 362, 364; and *Loveland* v. *United States,* 277 U. S. 583, 72 L. Ed. 999, 48 S. Ct. 603), and in another instance the question was certified to this Court for decision. (*United States* v. *Worley,* 281 U. S. 339, 74 L. Ed. 887, 50 S. Ct. 291.) In the case last cited, *United States* v. *Worley,* 281 U. S. 339, 74 L. Ed. 887, 50 S. Ct. 291, this Court refused to pass on this feature of the case although it was argued in the briefs, because your Honors believed it unnecessary for a correct decision on the facts presented. Then in *Wilbur National Bank* v. *United States,* 294 U. S. 120, 79 L. Ed. 798, 55 S. Ct. 362, 364, this Court avoided passing on this point because the grounds usually relied upon for an estoppel did not exist. Later in *Loveland* v. *U. S.* (C.C.A. 3rd) 25 F. (2d) 447, reversing D.C. 18 F. (2d) 585, certiorari granted, 277 U. S. 583, 72 L. Ed. 999, 48 S. Ct. 603, the question was squarely presented on the decision of the Circuit Court of Appeals of the Third Circuit in holding that the Government was not estopped under a war risk insurance contract by the conduct of the officers and employees of the Veterans Administration in writing to the veteran and leading him to believe that his policy of insurance was in force. However, the Government then confessed error because of the failure to file a waiver of a jury trial before the case was decided by this Court. (*Loveland* v. *United States,* 278 U. S. 665, 73 L. Ed. 571, 49 S. Ct. 80.) More recently in *United States* v. *Patryas,* 90 F. (2d) 715, the

Circuit Court of Appeals of the Seventh Circuit held that the Government was estopped under the facts presented from refusing to pay a veteran's claim under a war risk contract, but the opinion stated that there was no fraud involved in the case. Certiorari was granted by this Court, (302 U. S. 676, 82 L. Ed. 522, 58 S. Ct. 142), and judgment was affirmed in 303 U. S. 341, 82 L. Ed. 883, 58 S. Ct. 551, but the question of whether the Government might be estopped by its conduct was not mentioned in the opinion of this Court.

This question is also of tremendous importance in view of the increasing number of instances where the Administrator defeats recovery on war risk insurance contracts by merely referring to the files in his own office in order to show that the insured veteran made fraudulent answers in his application for insurance. Information given by a veteran while he is receiving hospitalization or asking for disability compensation is carefully preserved and used after the veteran's death to deny payment on his policy to the beneficiary. In the meantime, the Administrator continues to accept premiums and does not disclose that the policy will not be paid upon the veteran's death. (*Ray* v. *United States,* (C.C.A. 7th), 121 F. (2d) 416; *United States* v. *DePew* (C.C.A. 10th), 100 F. (2d) 725; *Jones* v. *United States* (C.C.A. 5th), 106 F. (2d) 888; *United States* v. *Riggins,* 65 F. (2d) 750; *Raives* v. *Raives,* 54 F. (2d) 267.) In the present state of the law a veteran has no assurance that despite the years his policy is in force that his widow's claim to the death benefit may not be defeated for something he may have innocently divulged on a periodical medical check-up at a regional hospital of the Government.

Petitioner believes also that the decision of the Circuit Court of Appeals in this case is contrary to the opinion of this Court in *Standard Oil* v. *United States,* 267 U. S.

76, 79; 69 L. Ed. 519, 521; 45 S. Ct. 211, where the Court held in a war risk admiralty insurance case that when the United States went into the insurance business it must be assumed to have accepted the ordinary incidents of such suits in such business.

This is the first application for a writ of certiorari in this case.

WHEREFORE, it is respectfully prayed that the petition for Writ of Certiorari be granted.

Respectfully submitted,

LINA H. HALVERSON, *Petitioner,*

.....

By JOSEPH J. WITRY,
Attorney for Petitioner.

Of Counsel:
FRANK A. McCARTHY,
JOHN E. TOOMEY,
JAMES C. O'BRIEN, JR.

State of Illinois }
County of Cook } ss.

Joseph J. Witry, being first duly sworn, makes oath and says that he is the attorney for the petitioner in the above cause, and that he has prepared the foregoing petition, and that the allegations therein are true as he verily believes.

.....

Subscribed and Sworn to before me this ..... day of October, A. D. 1941.

.....
Notary Public.

In my opinion the foregoing petition is well founded in law.

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